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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-1278

MT. HEALTHY CITY SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner,

vs.

FRED DOYLE,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUPPLEMENTAL AUTHORITIES OF PETITIONER

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ARGUMENT

1. When a nontenured school teacher's contract is not renewed and the teacher seeks reinstatement and backpay under the Civil Rights Act, 42 U.S.C. § 1983 and when the court finds that the defendant school board is not a "person" within the meaning of 42 U.S.C. § 1983 and therefore the court lacks jurisdiction under 28 U.S.C.

§ 1343, then the federal court should not exercise federal question jurisdiction under 28 U.S.C. § 1331 over the complaint.

Doyle filed suit under 28 U.S.C. § 1343 and the Civil Rights Act, 42 U.S.C. § 1983. The district court erroneously held the school board liable as a § 1983 "person". (See Judge Hogan's statement at page 30 in Appendix where he says "* * * the case is here as a § 1331 case, as well as a § 1983 one." Doyle now argues that even if this error were rectified the board would still be liable under 28 U.S.C. § 1331, federal question jurisdiction. However, this claim fails not only because Doyle's complaint lacks a sufficient amount in controversy¹ but also because plaintiff cannot "bootstrap" jurisdiction over the school district under 28 U.S.C. § 1331.

Each and every one of Doyle's authorities for the proposition that "reinstatement is a necessary part of the remedy where a teacher . . . has been terminated from employment for the exercise of rights protected by the First Amendment" (cited in Respondent's Brief, p. 41) is a case premised on § 1983 jurisdiction. Consequently, since the remedies Doyle seeks are directly dependent upon § 1983, his claim is dependent on § 1983 jurisdiction. Since Doyle is not entitled to damages against the school district under § 1983, assertion of jurisdiction under 28 U.S.C. § 1331 would be meaningless because he would have no remedy. The First Amendment is not self-executing. *Weathers v. West Yuma County School District*, 387 F.Supp. 552, 556 (1974), aff'd 530 F.2d 1335 (10th Cir. 1976). The Court should deny 28 U.S.C. § 1331 jurisdiction.

¹ See Petitioner's Brief, pp. 21-24 and Petitioner's Reply Brief; see also *Ramsey v. Hopkins*, 447 F.2d 128 (1971), holding damages to be backpay minus earnings.

2. In order to be entitled to reappointment and tenure a non-renewed, non-tenured teacher must prove that the paramount reason for his non-renewal was based on the exercise of his first amendment rights.

The lower courts are not unanimous on the degree to which non-renewal of a teacher is justified when there is a first amendment claim in the case. In the Tenth Circuit the test is whether the constitutional activity was the predominant or paramount reason. *Bertot v. School District No. 1, Albany County*, 522 F.2d 1171 (10th Cir. 1975), a case squarely on point, illustrates the standard. These two suits were consolidated. Both involved the claims of teachers that the nonrenewal of their contracts was, at least in part, in retaliation for the exercise of first amendment rights. In the first suit the principal prepared a written statement explaining the reasons for the non-renewal of Martha Sweeney which were: poor attitude, problems with students, and lack of judgment. Under lack of judgment one example was the fact that she had publicly taken a position contrary to the school district concerning a school dress code and had appeared on the radio to discuss it. Ms. Sweeney claimed that she was terminated in retaliation for this incident. The court, however, did not permit this claim to obscure its judgment. There were other reasons sufficient to warrant the non-renewal. The Board's decision was affirmed.

In the second suit, by contrast, the court found that the teacher's involvement with an underground newspaper was the predominant reason for her non-renewal. Since her first amendment activities with the paper did not violate the balancing test required by *Pickering v. Board of Educ.*,

391 U.S. 563 (1968), the court concluded that she was entitled to judgment.²

In *Adams v. Campbell County School District*, 511 F.2d 1242 (10th Cir. 1975), the court of appeals upheld the trial court's finding that there was substantial evidence of permissible reasons to support the board's non-renewal decision despite first amendment claims. In Doyle's case, the trial court found that there were sufficient permissible reasons to warrant non-renewal (A. 27, 28) but erroneously concluded that the impermissible reason controlled. That error should be corrected and the standard recognized by the Tenth Circuit applied. See also *Franklin v. Atkins*, 409 F.Supp. 439 (D.Colo. 1976).

Respectfully submitted,

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² The court remanded the case to consider the eleventh amendment immunity claim of the school district.